STATE OF MICHIGAN
IN THE SUPREME COURT

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST,

Plaintiffs/Appellees,

v.

CITY OF PONTIAC, Michigan,

Defendant/Appellant.

Supreme Court No. 151717

Court of Appeals No. 316418

Oakland County Circuit Court
Case No. 12-128625-CZ

DEFENDANT/APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL
COURT OF APPEAL'S OPINION ON REMAND

NOTICE OF HEARING

PROOF OF SERVICE

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STATEMENT IDENTIFYING ORDER APPEALED, INTRODUCTION & THE RELIEF SOUGHT

To resolve the City of Pontiac's financial emergency, the State-appointed Emergency Manager had to confront retiree legacy costs. As part of this process, the Emergency Manager suspended the City's obligation to make contributions to the Police and Fire VEBA, which is a trust created to provide health insurance to retired police and fire personnel. The Order effectuating the above stated:

> [The Trust is] amended to remove [the] obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect. (**Exhibit 1: EO 225**.)

Based on the above language, both Plaintiff and the City understood that the Emergency Manager suspended the City's obligation to make the 2011-2012 contribution to the VEBA; the parties, however, disagreed on whether these actions were legal. The above modification to the VEBA resulted in this lawsuit and Plaintiff advanced several arguments. Plaintiff argued: (1) that the contractual modification violated the Michigan Constitution; (2) that the modification violated City Ordinance; and (3) that the modification breached the collective bargaining agreements/trusts. After extensive briefing, the lower court dismissed Plaintiff's lawsuit in its entirety.

The Court of Appeals issued its first Opinion on March 17, 2015. (**Exhibit 2: First Opinion.**) In that Opinion, while agreeing that the Emergency Manager was authorized to modify the contract retroactively, the Court of Appeals found that the

Emergency Manager's language did not effectuate his intent. After noting that EO 225 "remove[d] [the contractual obligations] of the City *to continue* to make contributions to the Trust," the Court of Appeals found that the word *continue* only applied to "present or future" obligations and the Court determined that the $3,473,923 was not a "present or future" obligation because it was already accrued.

The City sought leave to appeal to this Court because, as the contribution had not yet been funded, it was *still* a *present* obligation. This Court scheduled the City's Application for oral argument on whether to grant leave to appeal or take other action. Ultimately, this Court reversed the Court of Appeals and held that:

> EO 225 *clearly states* that, as of August 1, 2012, the defendant no longer has an obligation "to continue to make contributions" under Article III of the Trust Agreement. It does not differentiate between already accrued, but unpaid obligations and future obligations, and thus by its terms applies to both. Accordingly, the Court of Appeals erred by concluding that the emergency manager did not intend to extinguish the defendant's 2011-2012 fiscal year contribution. (**Exhibit 3**)(emphasis added.)

For the first time in the Supreme Court, Plaintiff-Appellant suggested that the EM's action was impermissible under the test for retroactivity set forth in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26; 852 NW2d 78 (2014). Because this issue had not been raised or argued below, the Supreme Court remanded this case to the Court of Appeals for it to consider: (1) whether the retroactivity analysis stated in *LaFontaine* applies to EO 225; (2) if so, whether the extinguishment of the

defendant's accrued, but unpaid, 2011-2012 fiscal year contribution by EO 225 is permissible under *LaFontaine*; and (3) if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution.

On remand, the Court of Appeals held that EO 225 violated *LaFontaine*. (**Exhibit 4: Second Opinion.**) The Court of Appeal's Opinion was improper for two reasons. First, the Emergency Manager's Order was not "legislative action" subject to *Lafontaine*; rather, it was executive action that related to only *one* specific contract. As such, this case does not involve whether a law—which has general applicability to the public—should apply retroactively in a particular situation. In this case, the Emergency Manager's Order was tailored to one specific contract and, as such, there should be no confusion that he intended his Order to apply to the specific contract contemplated by EO 225's express language. Second, the Court of Appeal's Opinion violates the law of the case doctrine. This Court already held that EO 225 "clearly states" that it applies to "**already accrued, but unpaid obligations [retroactive] and future obligations [prospective]**." Despite the above, the Court of Appeals tacitly overruled this Court's Order by holding that EO 225 did not have "the requisite degree of clarity" in stating its intent to apply to already accrued obligations. The Court of Appeals held that EO 225 was not "clear []," "direct[]," or "unequivocal[]." This was

error because this Court has already held that EO 225 was clear and unambiguous in this regard.

The City now asks that this Court grant leave to appeal or take other peremptory action.

QUESTIONS PRESENTED FOR REVIEW

ISSUE ONE: Is an Emergency Manager's modification of a specific contract "legislative action" triggering *Lafontaine's* retroactivity analysis?

ISSUE TWO: Under *Lafontaine,* a "law" will be deemed properly retroactive if "there is specific language providing for retroactive application." In this case, this Court already held that EO 225—by its plain and unambiguous language—applied retroactively. Specifically, this Court held that EO 225 "does not differentiate between already accrued, but unpaid obligations [retroactive] and future obligations [prospective], and thus by its terms applies to both." Based on the above, did the Court of Appeals err when it held that EO 225 was not sufficiently clear regarding its stated intent and, in effect, tacitly overruled this Court's previous Order?

CONCISE STATEMENT OF PROCEEDINGS BELOW

This lawsuit was filed in August 2012. The City of Pontiac's motion for summary disposition involved Counts II, IV, and VI. Count II alleged that the City violated Art 9, § 24 of the Michigan Constitution when the City temporarily stopped making contribution to the VEBA health care trust. Counts IV and VI alleged that the Emergency Manager violated a City Ordinance and the VEBA trust agreement. On May 1, 2013, after oral argument, the trial court granted the City's Motion for Summary Disposition. Plaintiff appealed that Order.

On March 17, 2015, the Court of Appeals issued its first opinion. The Court of Appeals affirmed the lower court on every claim pled by Plaintiff and ruled upon by the trial court. However, the Court of Appeals held that the Emergency Manager's Order was ambiguous and did not say what the parties agreed it said. The Court of Appeal's—without the benefit of any briefing on the issue—imposed $3,473,923 of unexpected liability on a City that had just resolved its "financial emergency" status. The City filed a Motion for Reconsideration on April 6, 2015, which the Court of Appeals denied.

On June 4, 2015, the City sought leave to appeal to the Michigan Supreme Court. On September 30, 2015, the Supreme Court scheduled oral argument on the City's Application for Leave to Appeal. After oral argument, the Supreme Court issued the Order attached as **Exhibit 3**. The Supreme Court reversed the portion of the

Court of Appeal's Opinion that held EO 225 did not apply to obligations ending June 30, 2012. Specifically, the Supreme Court held that:

> EO 225 clearly states that, as of August 1, 2012, the defendant no longer has an obligation "to continue to make contributions" under Article III of the Trust Agreement. It does not differentiate between already accrued, but unpaid obligations and future obligations, and thus by its terms applies to both. Accordingly, the Court of Appeals erred by concluding that the emergency manager did not intend to extinguish the defendant's 2011-2012 fiscal year contribution.

The Supreme Court remanded this case to the Court of Appeals to consider: (1) whether the retroactivity analysis stated in *LaFontaine* applies to EO 225; (2) if so, whether the extinguishment of the defendant's accrued, but unpaid, 2011-2012 fiscal year contribution by EO 225 is permissible under *LaFontaine*; and (3) if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution.

On October 25, 2016, the Court of Appeals issued its Opinion on Remand. (**Exhibit 4.**) In doing so, the Court of Appeals held that an Emergency Manager's action relating to a specific contract was legislative action. The Court of Appeals also held that EO 225 was not properly retroactive because EO 225 was not sufficiently clear.

The City now files the present Application,

CONCISE STATEMENT OF MATERIAL FACTS

This is the second time this matter has been before the Court, so the City will focus only on the salient facts presented in this Application.

Plaintiff alleges that the City should have paid $3,473,923 to the VEBA for the fiscal year between July 1, 2011 and June 30, 2012. Because the City was unable to pay that sum, and because modifications could be made without impacting retiree health care, the Emergency Manager sought to temporarily relieve the City of this substantial burden.

On August 1, 2012, the Emergency Manager issued Executive Order 225 to amend the trust pursuant to MCL 141.1519(1)(k) to terminate the city's annual actuarially required contribution to the trust for fiscal year ending June 30, 2012. The order read with respect to its substantive provision as follows:

> Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect.

(**Exhibit 1**.)

LEAVE TO APPEAL SHOULD BE GRANTED
FOR THE FOLLOWING REASONS

MCR 7.302(B)(1)-(6) outlines the grounds for leave to appeal to the Supreme Court. The City of Pontiac contends that the following grounds are applicable to this leave to appeal:

- "[T]he issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity." MCR 7.302(B)(2).

- "[T]he issue involves legal principles of major significance to the state's jurisprudence." MCR 7.302(B)(3).

- "[I]n an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice. . ." MCR 7.302(B)(5).

First, this lawsuit involves a Michigan municipality that was recently under the control of an Emergency Manager; it still has a Transition Advisory Board and is still in receivership. This case has both "significant public interest" and involves "legal principles of major significance to the state's jurisprudence" because it directly involves the continued financial solvency of a major City. Second, the City believes that the Court of Appeal's Opinion violated the law of the case doctrine and seeks to avoid this Court's previous Order. This Court's previous Order and Mandate cannot be reconciled with the Court of Appeal's Opinion on remand. Lastly, review of this case will resolve undecided questions impacting numerous school districts and cities

throughout Michigan that are under the guidance of an Emergency Manager, namely: whether an Emergency Manager's Order is a "legislative action" triggering the application of *Lafontaine*.

1. *LAFONTAINE'S* TEST FOR RETROACTIVITY

There is no general prohibition on retroactive laws. However, as the Court explained, the legislature needs to "make its intentions clear when it seeks to pass a law with retroactive effect." *Lafontaine* at 85. To aid lower courts, this Court outlined a framework for determining whether a "law" should be given retroactive effect. This framework provides:

> In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute. [underling added.]

a. *The Emergency Manager's Modification of a Specific Contract is Not a "Law" for Purposes of Lafontaine*

Lafontaine addressed when "laws" will be given retroactive effect. *Lafontaine* did not address an Emergency Manager's Order modifying a specific contract. In this case Plaintiff seeks to elevate an alleged breach of contract into a legislative action.

For the reasons explained below, *Lafontaine* does not apply to the government action involved in this lawsuit.

A "law" is defined as "the principles and regulations established by a government or other authority and applicable to a people, whether by legislation or by custom enforced by judicial decision." *Random House Webster's College Dictionary* (2000). By its very essence, a "law" is of a general character and of general applicability. This is different than what we have in this case. In fact, in cases relating to the Contract Clause, the United States Supreme Court has explained that legislative action does not include the acts of executive officers. *New Orleans Waterworks Co v Louisiana Sugar-Ref Co*, 125 US 18; 8 S Ct 741; 31 L Ed 607 (1888); *Smith v Sorensen*, 748 F2d 427 (CA 8 1984).

In the case most factually similar to the instant action, the United States District Court for the Eastern District of Pennsylvania found that a resolution passed by the Southeastern Pennsylvania Transportation Authority ("SEPTA") that modified an employee benefit plan did not constitute legislative action. *Transp Workers Union of Am, Local 290 v Se Pennsylvania Trans Auth*, No. CIV. A. 96-0814, 1996 WL 420826 (ED Pa July 25, 1996).[1] In *SEPTA*, the Board approved a resolution which amended the retirement plan for supervisory, administrative, and management employees (the

1 The City is cognizant of the recent amendment to MCR 7.215 regarding the citation of unpublished opinions. Given the scarcity of analogous cases, the City believes the court's analysis is persuasive and useful to this matter.

"SAM plan"), and required enrolled employees, for the first time, to contribute a percentage of their future earnings to the SAM plan. *Id.* at *4-5. Plaintiff filed suit alleging, inter alia, that the resolution modifying the SAM plan violated the Contract Clause of the United States Constitution. *Id.* at *2. The court granted summary judgment in favor of SEPTA and the SAM Plan, finding that the resolution did not constitute a "law" for purposes of applying the Contract Clause. In its ruling, **the court defined "legislative power" as the lawmaking power of a legislative body involving actions that relate to subjects of permanent or general character**. *Id.* at *10 (citing Black's Law Dictionary 900 (6th ed. 1990)). The resolution at issue related only to the subject of employee benefits which extended to SEPTA employees who were members of SEPTA's SAM Plan. *Id.* at *15. Failing to relate to subjects of "permanent or general character," the resolution "did not possess the characteristics of a law of general application." *Id.* at *14-15 (citing *Contemporary Music Group, Inc v Chicago Park Dist*, 343 F Supp 505, 508 (ND Ill 1972)). Moreover, the resolution was not enforced against the public, unlike a resolution that would relate to SEPTA's operation of the transit system. *Id.* at *16. **It related only to SEPTA's pension plan, and affected only those participating in the plan.** *Id. see also Montauk Bus Co, Inc v Utica City Sch Dist*, 30 F Supp 2d 313 (NDNY 1998) (denying Contract Clause claim because the school district's actions relating to bus contract were not legislative acts); *see also Rivera-Nazario v Corporacion del Fondo del Seguro del Estado*, No.

CIV. 14-1533 JAG, 2015 WL 5254417, at *16 (DPR September 9, 2015)(same); *Hays v Port of Seattle*, 251 US 233; 40 S Ct 125; 64 L Ed 243 (1920)(holding that legislative action does not encompass claims that a state, or one of its subdivisions or agencies, has breached or repudiated a contract with another person).

In the present case, the Emergency Manager issued an Order relating to a specific contract; he did not pass any "law" of general applicability relating to subjects of a general character. As such, for purposes of *Lafontaine*, EO 225 is not a "law." This is no different than a teacher, police officer, or judge exercising authority granted to her under the laws of this State.

b. *This Court Already Held that EO 225, By Its Express Terms, Applied Retroactively and this Holding Should Be Dispositive*

If EO 225 is a "law," which it isn't, it would be deemed properly retroactive under *Lafontaine*. Under *Lafontaine*, a law is applied retroactively if "there is specific language providing for retroactive application." In fact, the Supreme Court's conclusion in *Lafontaine* held:

> Because nothing in the language of the 2010 Amendment evinces the Legislature's intent that Amendment apply retroactively, we decline to give it retroactive effect.

LaFontaine, supra at 88. As such, the dispositive question is simply: Did the Emergency Manager intend to apply EO 225 retroactively or, in other words, to

already accrued and owed contributions? This Court has already answered this question affirmatively, which should have been dispositive.

"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *KBD & Assoc, Inc v Great Lakes Foam Techs., Inc*, 295 Mich App 666, 679; 816 NW2d 464 (2012). Because this Court held that EO 225 "clearly states" that it applies to "**already accrued, but unpaid obligations [retroactive] and future obligations [prospective]**," the Court of Appeals erred when it found that EO 225 was not sufficiently clear.

Not only does EO 225 expressly apply to accrued obligations, Public Act 4 also authorized the Emergency Manager to modify or terminate existing, vested contracts. For example, MCL 141.1519 provided the Emergency manager the following powers:

> (g) Make, approve, or disapprove any appropriation, contract, expenditure, or loan, the creation of any new position, or the filling of any vacancy in a position by any appointing authority
>
> (j) Reject, modify, or terminate 1 or more terms and conditions of an existing contract.
>
> (k) After meeting and conferring with the appropriate bargaining representative and, if in the emergency manager's sole discretion and judgment, a prompt and satisfactory resolution is unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement.

Each of the above powers, which are implicated in this action, expressly allowed the Emergency Manager to modify existing contracts—i.e. contracts that were already vested. As such, the enabling statute, as well as EO 225, both expressly allowed the EO's Order to be retroactive.

2. UNDER *LAFONTAINE*, A "STATUTE" IS NOT "RETROACTIVE" SIMPLY BECAUSE IT RELATES TO AN ANTECEDENT EVENT

Lafontaine also held that ". . . a statute is not regarded as operating retroactively merely because it relates to an antecedent event." *Lafontaine*, *supra at* 85-86.This is the exact situation implicated in this Appeal.

The *Lafontaine* case involved a 2010 amendment to the Motor Vehicle Dealer Act. In that case, when LaFontaine and Chrysler entered into a dealership agreement in 2007, the MVDA limited manufacturers' right to establish a dealership within the relevant market area of existing dealers of the same line of vehicles, which was defined as being within six miles; however, in August 2010, the MVDA was amended by PA 139 of 2010 to extend the six-mile radius to nine miles. The issue in the Court of Appeals was whether the legislature intended this law of general applicability to be incorporated into existing contracts. The Supreme Court answered this question in the negative.

In this case, however, there is no law of general applicability. Rather, the Emergency Manager issued an Order that *related only to the contract in question in*

this lawsuit; stated differently, the Order specifically addressed an antecedent event—the Contract. In this case, there is no confusion whether the Emergency Manager wanted his Order to apply to the Contract in question. And, as such, EO 225 was proper under *Lafontaine*.

CONCLUSION & RELIEF REQUESTED

The Supreme Court remanded this case for three issues, which were:

1) whether the retroactivity analysis stated in *LaFontaine* applies to EO 225;

2) if so, whether the extinguishment of the defendant's accrued, but unpaid, 2011-2012 fiscal year contribution by EO 225 is permissible under *LaFontaine*; and

3) if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution.

As was explained above, the answer to the first question is "no." *Lafontaine* does not apply because an Emergency Manager's order—vis-à-vis a specific contract—is not a law. Second, even if *Lafontaine* is the appropriate test, it was appropriately retroactive because the Emergency Manager's intent to make his Order retroactive is clear; we know this because this Court already decided this issue.

Lastly, if *Lafontaine* does not apply, what is the appropriate method to determine whether the Order should be given retroactive effect? Defendants suggest that an Emergency Manager's Order should be given retroactive effect if that was the

intent of the Order. In this case, the Supreme Court has already held that the Order was intended to—and did so—apply to already accrued contributions.

For the reasons stated above, the City of Pontiac asks that the Court grant leave to appeal or take other peremptory action.

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Dated: November 15, 2016

PROOF OF SERVICE

JOAN M. FLYNN states that on the 15th day of November, 2016, she did serve a copy of the Defendant/Appellant's Application for Leave to Appeal Court of Appeals Opinion On Remand and this Proof of Service upon:

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/s/ Joan M. Flynn
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